

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1811 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

and

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NAGINBHAI DAHYABHAI MAKWANA

Versus

DALSUKHBHAI DHURABHAI VANKAR

Appearance:

MR JAYANT PATEL for Petitioner

MR NILESH A PANDYA for Respondent No. 1

MS ANU S VERMA for Respondent No. 2

CORAM : MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE C.K.BUCH

Date of decision: 29/01/99

ORAL JUDGEMENT [PER : R.K.ABICHANDANI,J]

At the request of both the parties, the matter is taken up for final hearing.

This appeal is directed against the order dated 7.1.1997 issuing probate certificate in the name of the

original applicant- present respondent no.1 in Misc. Civil Application No. 130/93. The probate application was made in respect of a will said to have been executed by Ramiben, wd/o Purshottambhai Ratanbhai who died on 7.9.1971. According to the applicant, the will was executed on 9.6.1964 and was registered in the office of the Sub Registrar on that day. It appears that the notice of the probate application was published in a daily news paper on 12.9.1993 and the present appellant filed his objection against the probate application. Objections were also filed by respondent no.2. Learned trial Judge observing that no affidavit was filed in support of the objection nor were witnesses examined, granted probate of the will exh.22.

At the hearing of this appeal, it is pointed out that an application was made by the appellant which is at exh.54 on 25.10.1996 praying to permit the appellant to lead evidence and seeking an opportunity to cross-examine the witnesses. That application, as it appears from the rojkam, was listed from time to time and lastly on 5.11.1996 for hearing. Thereafter, the matter was posted on 10.12.1996, but no orders seems to have been passed. The matter was then listed on 7.1.1997 on which date, the impugned order was made. It, therefore, clearly appears that though the application exh.54 dated 25.10.1996 was fixed for hearing, the Court did not make any orders thereon and straightway proceeded to make impugned order granting probate on 7.1.1997. This is borne out from the rojkam which is shown to us. It appears from the manner in which the matter has proceeded that the attention of trial court was not brought to the provisions of Sec.295 of the Indian Succession Act, 1925 which provides that in contentious cases, the proceedings shall take, as nearly as may be, a form of a regular suit according to the provisions of the Code of Civil Procedure in which the petitioner for probate shall be the plaintiff and the person who has appeared to oppose the grant, shall be the defendant. It is obvious from the record that the impugned order granting probate has been made without giving the appellant an adequate opportunity of hearing and without following the procedure as is required to be followed in such matters.

The impugned order is, therefore, set aside and the matter is remanded to the trial court for proceeding with it afresh from the stage of the applications exh.53 & 54 which were not decided. It will be open for the parties to take up all the contentions available to them under the law before the trial Court including the contention on the basis of sec.295 of the Indian Succession Act, 1925.

Appeal is allowed accordingly with no orders as

to costs. Since the matter is old, the trial Court will expeditiously dispose of the same.

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